83-149

No. _____

Office - Supreme Court, U.S.
FILED
JUL 11 1983
ALEXANDER L. STEVAS,
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

VAN BERING ROBINSON, PETITIONER

v.

STATE OF NEW MEXICO

PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

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QUESTIONS PRESENTED

1. Whether after an actual conflict of interest has arisen in a Public Defender's Office, can the subsequent "farming out" of co-defendants to separate independent counsel cure an alleged denial of rights protected by the 6th Amendment to the United States Constitution.

2. Whether a meritorious claim may be presented which alleges a deprivation of due process rights due to outrageous police conduct, even though a criminal defendant has been shown to be pre-disposed to commit criminal acts.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No._____

VAN BERING ROBINSON, PETITIONER

v.

STATE OF NEW MEXICO

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW MEXICO SUPREME COURT

Van Bering Robinson, Petitioner, petitions for a writ of certiorari to review the judgment of the New Mexico Supreme Court in this case.

OPINIONS BELOW

The opinion of the New Mexico Supreme Court is unofficially reported at 22 State Bar of New Mexico Bulletin No. 14, Page 405. A copy of the unofficial opinion is included in the appendix.

The opinion has not yet officially been reported in New Mexico Reports (N.M.) or in Pacific Reporter (P.2d). The New Mexico Supreme Court's denial of Petitioner's motion for a rehearing is also included in the appendix.

JURISDICTION

The judgment sought to be reviewed was filed April 26, 1983. A motion for a rehearing was denied on May 12, 1983. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

Although the New Mexico Supreme Court granted Petitioner a new trial, based on a question not presented here, it did, however, enter a final judgment regarding the Constitutional questions presented before this court. See, *South Dakota v. Neville*, _____ U.S. _____, 103 S. Ct. 916 (1983); *California v. Stewart*, sub nom, *Miranda v. Arizona*, 384 U.S. 436 (1965).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall ... be deprived of life, liberty or property without due process of law.

2. The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defense.

3. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall ... deprive any person of life, liberty or property, without due process of law.

STATEMENT

On September 10, 1980, an Albuquerque police officer was shot and killed while attempting to apprehend an unknown fleeing robber. Two days later, Petitioner and Reginald Walker were arrested, charged with the armed robbery and the murder. Both suspects were represented by the Albuquerque Public Defender's office. The grand jury returned a no bill; Petitioner and Walker were released. They were, however, still considered prime suspects and were subjected to constant police scrutiny. On February 20, 1981, Walker was arrested for a different armed robery and was again assigned to the Public Defender's office. On February 28, 1981, Petitioner was arrested on unrelated charges, arising from his participation in burglaries with a paid police informant. Petitioner also was assigned to the Public Defender's office. Although, Petitioner and Walker were assigned to different attorneys within the Public Defender's office, the possibility of a conflict of interest was apparent and a directive was sent to the two attorneys representing Petitioner and Walker not to enter into any plea bargains concerning the homicide without first consulting the Chief Public Defender. Nevertheless, Walker, who was still

Petitioner argues that during the time in which there was an actual conflict of interest,[1] irreparable damage was done to his cause. The foundation for his reindictment on the murder charge was laid during this period of conflict. Although the New Mexico Surpeme Court felt that the subsequent farming out "resolved" or cured this constitutional violation [see *Cuyler*, supra; see also, *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d, 426 (1978); *Glasser v. United States*, 315 U.S. 60, 62 S.Ct 457, 86 L.Ed.680 (1942)], there is no support for such a proposition. In *Commonwealth v. Michel*, 409 NE2d, 1293 (Mass., 1980), one of the only reported cases found by Petitioner, touching on the specific issue, whether or not a constitutional violation was cured by subsequent acts attempting to resolve the conflict of interest was discussed. The Court there held, however:

> We do not regard counsel's attempt to terminate his relationship ... as curing the conflicts which arose from ... simultaneous representation.

409 NE at 1298.

[1] It is well established that when two co-defendants, who have conflicting interests, are both represented by the same Public Defender's office, a conflict of interest exists. *See, Commonwealth v. Evans*, 451 A2 1373, (Pa. 1982); *State v. Rogers*, 426 A2 1035 (N.J. 1981); *Pinkerton v. State*, 395 So.2 1080 (Ala. 1981); *People v. Dooley*, 169 Cal. R. 76 (Ct. App. 1981); *Parker v. Parratt*, 662 F.2d 479 (Eighth Circuit, 1981); *Ross v. Heyne*, 638 F.2d 979 (Seventh Circuit, 1980); *State v. Smith*, 621 P.2d 697 (Utah, 1980).

To address this issue will help shed light on exactly what the court meant in *Cuyler v. Zimmerman*, supra, when it held that only a showing of adverse affect would permit a reversal of a criminal conviction, due to a conflict of interest which denies a criminal defendant rights guaranteed by the Sixth Amendment of the U.S. Constitution.

II. *The Outrageous Police Conduct Claim*

This issue would afford the court an opportunity to clarify its plurality opinion in *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976). Specifically, the issue, as phrased by Mr. Justice POWELL is:

> Whether over-involvement of government agents ... could even reach such proportions as to bar conviction of a predisposed defendant as a matter of due process.

Hampton, 425 U.S. at 493, 96 S.Ct. at 1651, 48 L.Ed.2d 122.

Since the *Hampton* opinion, the Federal Courts of Appeals have been in conflict as to whether or not a finding of predisposition would negate a due process claim. The Second Circuit,[2] the Sixth Circuit,[3] and the Seventh Circuit,[4] have

[2] *U.S. v. Neal*, 536 F.2d 533 (2nd Cir., 1976).

[3] *U.S. v. Leja*, 563 F.2d 244 (6th Cir., 1977).

[4] *U.S. v. Carreon*, 626 F. 2d 528 (7th Cir. 1980); *U.S. v. Duff*, 551 F.2d 187 (7th Cir., 1977).

adopted the position taken by Mr. Justice RHENQUIST, Mr. Justice WHITE and the CHIEF JUSTICE which holds that a finding of predisposition to commit a crime would bar a due process claim against government agents. *Hampton v. United States,* 425 U.S. 484, at 489; 96 S.Ct. 1646, at 1650.

On the other hand, the First Circuit,[5] the Third Circuit,[6] and the Ninth Circuit,[7] have followed the concurring opinions of Mr. Justice POWELL, Mr. Justice BLACKMUN, and the dissenting opinions of Mr. Justice MARSHALL, Mr. Justice STEWART and Mr. Justice BRENNAN, which observe that a finding of predisposition would not bar a due process claim which was based on outrageous conduct by government agents. *Hampton v. United States,* 425 U.S. 491-500, 96 S.Ct. 1650-1655. *See generally,* Yasuda, *Entrapment as a Due Process Defense: Development After Hampton v. United States,* 57 Indiana Law Journal 89 (1982).

Both during Petitioner's trial, on appeal, and in a motion for rehearing to the New Mexico Supreme Court, Petitioner

[5] *U.S. v. Caron,* 615 F.2d 920 (1st Cir., 1980); *U.S. v. Johnson,* 565 F.2d 1979 (1st cir., 1977).

[6] *U.S. v. Twigg,* 588 F.2d 373 (3rd Circuit, 1978).

[7] *U.S. v. Wylie,* 625 F. 2d 1371 (9th Cir., 1980); *U.S. v. McQuin,* 612 F.2d 1193 (9th Cir., 1980); *U.S. v. Prarie,* 572 F.2d 1316 (9th Cir., 1978).

raised constitutional questions to the effect that his due process rights were violated, due to outrageous police conduct in "targeting" him as a prime suspect, in its method of gathering admissions against him and in its use of paid informers.

The New Mexico Supreme Court dismissed these claims as being without merit. It would seem that because the trial court found that Petitioner was predisposed to commit criminal acts, it served as the basis for the New Mexico Supreme Courts finding that the due process claims raised by Petitioner were without merit. This construction would place the New Mexico Surpeme Court in the camp with the Second, Sixth and Seventh Circuits, which follow Mr. Justice RHENQUIST's opinion, as discussed above. See also, footnotes 2 through 4 above. Petitioner here is not asking this court to decide whether or not his due process right were violated; rather, he is simply asking this court to enlighten the court below on whether or not his predisposition to commit criminal acts automatically bars his due process claims or whether his due process claim was meritorious enough to deserve more than a summary dismissal. To rule one way or another in this case would clear up much of the confusion which resulted from the lack of a majority opinion in *Hampton v. United States*.

CONCLUSION

This Petition For Writ of Certiorari should be granted because the questions presented here go directly to the heart of the relationship of the criminal defendant to the protections afforded United States citizens in the United States Constitution.

From the New Mexico Supreme Court

STATE OF NEW MEXICO,
Plaintiff-Appellee,

versus

VAN BERING ROBINSON
Defendant-Appellant.

No 13747 (filed April 26, 1983)

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY
JOSEPH F. BACA, District Judge

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For Appellant

OPINION

DAN SOSA, JR., Senior Justice.

The appellant was charged in four separate indictments with two counts of auto burglary, five counts of commercial burglary, four counts of larceny, attempted armed robbery, two

counts of armed robbery, conspiracy to commit armed robbery, and alternative counts of premeditated murder or felony-murder for the death of Albuquerque Police Officer Phil Chacon. Following a jury verdict of guilty on all counts, the appellant moved for a judgment notwithstanding the verdict or for a new trial, but his motion was denied. On appeal, this Court remanded the case to the district court for a hearing on the motion for a new trial. After a hearing, the district court again denied the motion. Mr. Robinson now appeals to this Court seeking reversal of his convictions. We reverse in part and affirm in part.

The events giving rise to this appeal began on September 10, 1980, when a lone black gunman held up a Kinney Shoe Store in Albuquerque. Officer Phil Chacon happened to be across the street from the store at the Battered Women's Shelter. Upon being informed of the robbery, he set out on his motorcycle in pursuit of the gunman's auto. He had just followed the getaway car into a parking lot when two shots rang out. Officer Chacon fell from his motorcycle and the gunman made good his escape.

I

It is the contention of the appellant that the impeachment of Brian Iwanski through Renee Gonzales by an unfounded charge of theft was improper. We agree. Brian Iwanski and Renee Gonzales were the employees of Kinney Shoes who were robbed at gunpoint on the evening of September 10, 1980. The two men were the State's first witnesses. On cross-examination by defense counsel, Mr. Iwanski testified that the appellant was not the robber. During direct examination of Mr. Gonzales, the State asked him about statements that Mr. Iwanski had made concerning police threats and about Mr. Iwanski's resentment of those threats. In an effort to establish the veracity of Mr. Iwanski's accounts of police threats, defense counsel on cross-examination asked Mr. Gonzales whether he had found Mr. Iwanski to be honest and truthful. Mr. Gonzales replied in the affirmative. During the redirect examination of Mr. Gonzales, the State attempted to impeach Mr. Iwanski's credibility by eliciting testimony which disclosed that Mr. Iwanski had been fired by Kinney Shoes after an inventory audit revealed a $1,600 shortage. Mr. Gonzales further testified that

the inventory shortages thereafter ceased, although there was no evidence that either Mr. Iwanski or another employee who was also fired was responsible for the deficit.

The questions put to Mr. Gonzales by the State suggested that Mr. Iwanski was guilty of embezzlement. Proof of the conviction of certain crimes may be used to impeach a witness. NMSA 1978, Evid.R. 609. It has long been recognized in New Mexico that "[a]ll reasonable care, and the utmost good faith, must be exercised by the prosecutor, when questioning an accused about prior convictions, to the end that an accused is not prejudiced by suggestions that he has been convicted of a misdemeanor or felony, when in fact he has not been so convicted." *State v. Williams*, 76 N.M. 578, 582, 417 P.2d 62, 65 (1966); *State v. Miller*, 92 N.M. 520, 590, P.2d 1175 (Ct. App. 1979); *State v. Hargrove*, 81 N.M. 145, 464 P.2d 564 (Ct. App. 1970). The same safeguards govern the impeachment of the credibility of a witness other than the accused. *Dukes v. State*, 356 So.2d 873 (Fla.Dist.Ct. App. 1978). New Mexico Rule of Evidence 609 was inapplicable in the instant case as there was no allusion to a conviction and the prosecuting attorney was ap-

parently never prepared to offer documentary proof of a conviction. Nevertheless, the same rationale applies to the impeachment of a witness under Evid.R. 608(b).

New Mexico Rule of Evidence 608(b) prohibits the admission of extrinsic evidence to prove instances of a witness's prior misconduct not the subject of conviction for impeachment purposes except in certain limited situations. NMSA 1978, Evid.R. 608. One of the factors a trial judge must consider in deciding whether to allow inquiry about past conduct is the character of the previous conduct. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE Section 42 (2d ed. 1972); 3 J. WEINSTEIN and M. BERGER, WEINSTEIN'S EVIDENCE Paragraph 608 [05] (1982). In considering the character of the prior conduct, the trial court must take care to distinguish actual misconduct from a mere accusation of misconduct.

> It should be understood by all courts that the only relevant circumstance is actual conduct, i.e., the fact, not the mere charge, of having misbehaved. If it is improper to prove this by extrinsic testimony on the stand, it is doubly improper to attempt to prove it by hearsay, and trebly improper when

accompanied by a prohibition of any rebuttal of the hearsay by the witness or by others on his behalf.

3A J. WIGMORE, WIGMORE ON EVIDENCE Section 980a (Chadbourn rev. 1970). Mr. Gonzales' testimony concerning suspicions of embezzlement did not amount to evidence of misconduct. The impeachment of a witness by insinuations based on unsubstantiated allegations of prior misconduct provides the trier of fact with no information relevant to the witness's credibility and carries a great potential for prejudice. Where, as in the instant case, the testimony relates to collateral matters and has no bearing upon the crime with which the defendant is charged, there is also a danger that the real issues of the case may become confused. The State's questions served no purpose except to arouse the prejudices of the jury against Mr. Iwanski. *See State v. Rowell*, 77 N.M. 124, 419 P.2d 966 (1966).

The trial court abused its discretion in admitting Mr. Gonzales' testimony concerning Mr. Iwanski's firing and the subsequent cessation of inventory shortages. Mr. Iwanski's credibility could not logically by affected by testimony that his former

and a deal was struck between the State and Mr. Walker. The assistant public defender who represented Mr. Walker had been instructed by his supervisor that, because of the potential for conflict between the Robinson and Walker cases, he was not to negotiate a plea agreement for Mr. Walker without first obtaining the approval of his superiors. The assistant public defender apparently disregarded the orders of his supervisor and conferred privately with Mr. Walker about the plea before Mr. Walker spoke with the police. However, the attorney was not present during Mr. Walker's conversations with the police or when Mr. Walker signed his statement. At the time the State and Mr. Walker entered into their agreement, the public defender's office had no open cases on Mr. Robinson, although they knew that the public defender was to be appointed as Mr. Robinson's counsel on the charges that did not involve Mr. Walker.

As soon as the District Public Defender learned of Mr. Walker's plea agreement, he assigned both cases to separate and independent attorneys. On the day Mr. Robinson was arrested on the charges stemming from Mr. Walker's formal statement, notice of his arraignment was sent to his independent counsel. During the State's case in chief and again after

the State rested its case, defense counsel moved for dismissal of all charges against Mr. Robinson because the public defender had negotiated Mr. Walker's plea agreement while representing Mr. Robinson. Both motions were denied on the ground that the public defender was not representing Mr. Robinson at the time of Mr. Walker's plea agreement, although the public defender had represented Mr. Robinson in the past.

"Where a constitutional right to counsel exists...there is a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia,* 450 U.S. 261, 271 (1981). A lawyer who represents co-defendants whose interests conflict cannot provide the adequate legal assistance required by the Sixth Ammendment. *See Holloway v. Arkansas,* 435 U.S. 475 (1978). Although the violation of the right to effective assistance of counsel does not depend on a showing of prejudice, *id.*, a defendant must show that his counsel actively represented conflicting interests. *See Glasser v. United States,* 315 U.S. 60 (1942).

The most recent United States Supreme Court case addressing the effect of multiple representation of defendants on the Sixth Amendment right to effective assistance of counsel is *Cuyler v. Sullivan,* 446 U.S. 335 (1980). The Court in *Cuyler* noted that a possible conflict of interest inheres in almost every

instance of multiple representation, but held that "the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 350.

The potential for conflict between the Robinson case and the Walker case existed from the time the two men were arrested in September 1980, but an actual conflict between the two cases did not arise until Mr. Walker made his statement to the police in early March 1981. The representation of a criminal defendant and co-defendant turned prosecution witness by two lawyers who are members of the same association gives rise to a conflict of interest. *State v. Smith,* 621 P.2d 697 (Utah 1980). The danger that privileged information might be used, even inadvertently, to the detriment of one client or the other is present in almost every such situation. The conflict of interest in the public defender's office was foreseen and finally resolved by assigning both the Walker and Robinson cases to independent counsel. Only the potential for conflict between the cases existed at the

time the public defender represented both men. As soon as an actual conflict developed, the public defender represented neither man.

Mr. Robinson was never represented by an attorney from the public defender who owed a conflicting duty to Mr. Walker or who actively represented conflicting interests. Nevertheless, given these circumstances, the public defender's office came perilously close to representing clients with conflicting interests. Attorneys in public office should bear in mind that even the appearance of impropriety in the conduct of the office is to be avoided. *See State v. Chambers*, 86 N.M. 383, 524 P.2d 999 (Ct.App.), *cert, denied*, 86 N.M. 372, 524 P.2d 988 (1974).

Under the facts in this case, we cannot conclude either that an actual conflict of interest adversely affected Mr. Robinson's lawyer's performance, that an actual, relevant conflict existed during the proceedings, or that there was a substantial possibility that a conflict of interest affected Mr. Robinson's lawyer's representation. Mr. Robinson's counsel at trial prosecuted the defense with competence and vigor. Mr. Robinson was not denied his constitutional right to effective assitance of counsel.

III

Mr. Robinson asserts that prosecutorial misconduct in presenting Reginald Walker's plea agreement for judicial approval the day the appellant's jury was being selected denied the appellant a fair trial and requires that his convictions be reversed. Because of the presentation, Mr. Robinson moved to sequester the jury, to declare a mistrial, or for a change of venue on the ground that the presentation was deliberately timed to create publicity prejudicial to the appellant's right to a fair trial. The trial court denied the motions, choosing to rely on strong admonitions to the jury to avoid news accounts of the case to protect Mr. Robinson's rights. The presentation was attended by a news photographer and resulted the following day in a front-page article and picture showing Mr. Walker flanked by his attorney and an assistant district attorney. On voir dire, the jurors declared that they could consider the evidence fairly and impartially. After jury selection and before the appearance in the press of the article and picture, the trial court strictly admonished the jury to avoid news accounts of the trial. There is no evidence that any of the jurors disregarded the court's ad-

monitions and read the article. Given these facts, the trial court did not err in denying the appellant's motions on the ground that the publicity had not denied the appellant a fair trail. *State v. Sanchez*, 79 N.M. 701, 448 P.2d 807 (Ct. App. 1968).

We have examined the other issues raised by the appellant and find them to be without merit.

CONCLUSION

For the reasons stated in part I of this opinion, we reverse Mr. Robinson's convictions for the armed robbery of Kinney Shoes and the murder of Officer Chacon and remand the cause to the district court for a new trial and further proceedings consistent with this opinion. For the reasons stated in parts II and III, we hold that Mr. Robinson was not denied a fair trial and affirm his convictions on the remaining charges.

This opinion is entered after rehearing was granted and is substituted for that opinion upon which rehearing was granted.

IT IS SO ORDERED.

s/DAN SOSA, JR., Senior Justice

WE CONCUR:
s/H. VERN PAYNE, Chief Justice
s/GEORGE L. ZIMMERMAN, District Judge, sitting by designation

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Thursday, May 12, 1983

NO. 13,747

STATE OF NEW MEXICO,

Plantiff-Appellee,

vs.

VAN BERING ROBINSON,

Defendant-Appellant.

This matter coming on for consideration by the Court upon Motion of Appellant for Rehearing, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that motion of Appellant for rehearing is hereby denied.

ATTEST: A TRUE COPY

Clerk of the Supreme Court
of the State of New Mexico

APPENDIX B